

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's Rules	)	
Regarding the Pricing of Unbundled	)	WC Docket No. 03-173
Network Elements and the Resale of	)	
Service by Incumbent Local Exchange	)	
Carriers	)	

**REPLY COMMENTS OF COVAD COMMUNICATIONS**

Covad Communications hereby files its reply comments in the above-referenced proceeding in response to the Commission's Notice of Proposed Rulemaking in CC Docket No. 03-173.<sup>1</sup> Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly half of the nation's homes and businesses. As a facilities-based provider, Covad relies on incumbent LECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in over 1800 central offices throughout the nation. As a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by the Commission's proceeding to reexamine the methodology used to set prices for access to the bottleneck facilities upon which Covad relies to reach its customers.

In these reply comments, Covad writes briefly to support the following points:

- Wholesale revisions to the Commission's forward-looking long-run incremental cost methodology are unwarranted.
- The real-world attributes of routing and topography confronting any carrier deploying network facilities can be readily incorporated into existing cost models to render them more accurate representations of forward-looking costs.
- As a result of the Commission's elimination of various forms of broadband facilities access altogether in the *Triennial Review*, ILECs can no longer claim that TELRIC rates for such access must be increased to stimulate investment. Instead, TELRIC rates should be adjusted to exclude costs for facilities that CLECs may no longer access.
- This proceeding affords the Commission an opportunity to make important clarifications to its application of TELRIC to non-recurring costs, loop conditioning charges, and power charges. By making the clarifications suggested herein, the Commission can ensure that ILECs do not over-recover for their forward-looking costs of providing access to network elements.

Covad supports the Commission's stated commitment to maintaining the existing requirement that UNE prices be developed according to a forward-looking cost mechanism.<sup>2</sup> Indeed, as the Commission's NPRM recognizes, forward-looking costs are the best means of ensuring that incumbents are not rewarded for the inefficiencies in their legacy networks – inefficiencies that are the direct result of more than one hundred years of rate-of-return regulation at both the state and federal level.<sup>3</sup> Instead, a forward-looking costing mechanism, properly applied and implemented, is the best means of ensuring that incumbents remove such inefficiencies over time and, through the continual process of capital and facilities investments, realize the efficiencies that would have arisen under competitive market conditions. Covad urges the Commission not to abandon its TELRIC

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<sup>1</sup> *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, CC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. September 15, 2003) ("NPRM").

<sup>2</sup> See NPRM at para. 37.

principles for setting unbundled network element ("UNE") prices. Such a major change is not necessary to promote effective competition or to allow the incumbent local exchange carriers ("ILECs") to recover their costs. However, as described in more detail in Covad's initial comments, minor improvements to TELRIC may be made.

Covad agrees with the Commission's desire to have TELRIC models more accurately reflect the "real-world attributes of the routing and topography" of incumbent networks in the development of forward-looking costs.<sup>4</sup> Most "real world attributes" can (and should) be accommodated within the economists' classic version of a long run planning horizon. However, the Commission must recognize the important distinction between "real world attributes" related to the underlying cost conditions facing a carrier, and those which are merely descriptive of the actual network that the ILEC happens to be operating. In other words, the Commission must recognize the distinction between the "real-world attributes" that would face any efficient carrier deploying network facilities (e.g., rights of way, roads, lakes, rivers, mountains) and the network attributes that are largely or entirely within the control of the ILEC. Furthermore, if the Commission adopts rules requiring TELRIC models to incorporate network attributes solely in control of the ILEC, the resulting cost model inputs would hardly be rendered transparent and verifiable. Rather, the Commission's UNE pricing rules would resurgent the very information asymmetries in rate-making proceedings that TELRIC was adopted to overcome, allowing ILECs to manipulate cost models to artificially inflate their costs above efficient levels.

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<sup>3</sup> See *id.*

<sup>4</sup> See *NPRM* at para. 52.

Unfortunately, in the name of “real-world attributes,” the ILECs variously ask for revisions to the Commission’s rules that reward them for inefficiencies in their legacy networks in ways that have nothing to do with forward-looking costs. For example, the ILECs variously ask the Commission to simply assume that their existing networks are models of efficiency, as a result of the imposition of price cap regulation for some carriers and services at the federal level, and in some cases the state level.<sup>5</sup> While price caps should provide better incentives for ILECs to reduce costs and operate efficiently than traditional cost-of-service regulation, the ILECs are still monopoly providers of local services in most areas of their territories. Moreover, as the Supreme Court explained in *Verizon v. FCC*, price caps have been just one step along a road of improvements regulators have made to rate-making methodologies, designed to reduce excessive levels of over-investment in ILEC plant.<sup>6</sup> As the Supreme Court also recognized, however, price cap regulation still suffers from the same information asymmetries that plague all rate-based rate-setting methodologies, and are thus hardly a guarantor of rate-setting according to efficient investment levels.<sup>7</sup> Thus, the Commission should not rely on the ILECs’ current investments or the mix of technology in their current networks as inputs in a TELRIC analysis. Indeed, in one form or another, the ILECs’ proposals to include the costs of their existing network facilities in TELRIC rates violate the Commission’s stated intent to adhere to the economic principle of forward-looking costing.<sup>8</sup> While the ILECs studiously object to the Commission adopting a short-run costing methodology,

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<sup>5</sup> See, e.g., Verizon Comments at iv, 26; Qwest Comments at 22, SBC Comments at 25.

<sup>6</sup> See *Verizon v. FCC*, 122 S.Ct. 1646, 1660-61 (2002).

<sup>7</sup> See *id.*

<sup>8</sup> See *NPRM* at para. 37.

what they propose amounts to a blend of long-run and short-run costing methodologies – some degree of long-run costing mimicking backward-looking embedded costs, and some degree of short-run costing for forward-looking new investments. Such a mix and match approach of costing methodologies is supported neither by the Commission’s stated intent to retain forward-looking cost principles, nor by economic costing principles (which look only at forward-looking costs), and is designed solely to increase CLECs’ costs.

The ILECs variously argue that increases in TELRIC rates are necessary in order to spur investment by both ILECs and CLECs in building out broadband networks. As Covad explained in its initial comments, however, this argument rings hollow. As an initial matter, it is worth noting that the Commission’s TELRIC pricing rules only apply to elements for which the Commission has already found impairment – in other words, elements that it has already determined are bottleneck network facilities unlikely to be duplicated by competitors. Moreover, the Commission’s *Triennial Review Order* provided wide exemptions from unbundling requirements for last-mile transmission facilities used to provide mass market broadband services.<sup>9</sup> The Commission created federal rules that completely exempted incumbent LECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.<sup>10</sup> The Commission created federal rules that completely exempted incumbent LECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as

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<sup>9</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) (“*Triennial Review Order*”).

<sup>10</sup> See *Triennial Review Order* at paras. 285-297.

UNEs, in both new-build and overbuild situations.<sup>11</sup> Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,<sup>12</sup> and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.<sup>13</sup> In sum, the Commission's *Triennial Review Order* already provides the incumbent LECs with a staggering amount of deregulation – for both mass market and enterprise loop facilities. Thus, there is no reason for the Commission in this proceeding to adjust TELRIC rates that apply to other facilities in order to attempt to adjust some perceived misalignment of incentives regarding broadband deployment – the ILECs have already received whatever relief they seek from TELRIC pricing in the form of the elimination of broadband UNE access altogether.

Rather than increasing the rates for UNE access remaining after the *Triennial Review Order*, as Covad explained in its initial comments, the appropriate course for the Commission would be to make clear that ILEC rates must be properly adjusted to account for the elimination of CLEC access to broadband network facilities in the *Triennial Review Order*. In its initial comments, Covad pointed out the tension between UNE rates developed under the assumption that competitors would be able to access the advanced services functionalities of next generation digital loop carrier systems and the Commission's determination in the *Triennial Review Order* not to actually allow such access. Accordingly, Covad welcomes general direction from the Commission that, to the extent UNE prices do in fact include the costs of providing such next generation

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<sup>11</sup> See *Triennial Review Order* at paras. 273-284.

<sup>12</sup> See *Triennial Review Order* at paras. 535-541.

<sup>13</sup> See *Triennial Review Order* at paras. 298-342.

features and functions, such costs should be excluded from UNE prices where competitors are denied access under the Commission's *Triennial Review Order*.<sup>14</sup>

In its initial comments, Covad strongly opposed the Commission's suggestion of establishing a "presumption that an incumbent LEC's current practices with respect to non-recurring activities are efficient."<sup>15</sup> Instead, as Covad explained, the Commission has every reason to expect that incumbent LEC non-recurring activities will be entirely inefficient and discriminatory when "competitive LECs are the primary users of a particular activity."<sup>16</sup> In fact, as Covad's initial comments explained, excessive and discriminatory non-recurring charges for access to line splitting arrangements persist in many of the RBOC territories.<sup>17</sup> To remedy these excessive non-recurring charges for line splitting, Covad suggested that the Commission require that the state commissions review the actual forward looking work steps required to make simple migrations to line splitting. Furthermore, Covad suggested that, until state commissions are able to evaluate how these migrations would occur in a forward looking environment, on an interim basis ILECs should not be permitted to recover for more than a single service order and should be prohibited from imposing unsubstantiated loop installation charges.<sup>18</sup> In addition, Covad urged the Commission to clarify its rule in section 51.507(e) regarding the recovery of non-recurring costs through recurring charges. Specifically, Covad urged the

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<sup>14</sup> See Covad Comments at 5-6.

<sup>15</sup> See *NPRM* at para. 119.

<sup>16</sup> See *id.*

<sup>17</sup> See Covad Comments at 11-17.

<sup>18</sup> See *id.* at 17.

Commission to make clear that such non-recurring costs should not be recovered through recurring charges in perpetuity, but rather should end after a specified period of time.<sup>19</sup>

As explained in its initial comments, Covad supports the Commission's proposal to allow charges for loop conditioning only in extraordinary circumstances, such as copper loops that exceed 18,000 feet in length.<sup>20</sup> Covad agrees that, as the Commission recognized in the *UNE Remand Order*, pursuant to industry engineering standards loops under 18,000 feet in length should be free of impairments such as load coils and excessive bridged taps.<sup>21</sup> Thus, as multiple state commissions have already recognized, loop conditioning activity to remove such impairments should not be necessary in a forward-looking network.<sup>22</sup> Accordingly, Covad submits that loop-conditioning charges for loops under 18,000 feet in length violate the Commission's forward-looking cost principles, and allow ILECs to double-recover for the provision of an unbundled loop.<sup>23</sup>

In its initial comments, Covad agreed with the Commission's suggestion that charges for DC power should be based on the number of amps consumed rather than the number of amps fused.<sup>24</sup> In resolving this issue, the Commission must be guided by the principle that CLECs should pay only for what they use and no more. If CLECs are not charged on an amps used basis, then CLECs will be required to pay substantially in excess of the costs they actually incur, and ILECs will be grossly overcompensated for the power they provide for CLEC collocation. Furthermore, Covad made clear that any

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<sup>19</sup> See *id.* at 17-18.

<sup>20</sup> See *NPRM* at para. 130.

<sup>21</sup> See *NPRM* at para. 130.

<sup>22</sup> See Covad Comments at 18-20.

<sup>23</sup> See *id.*

<sup>24</sup> See *NPRM* at para. 147.



objections in an individual state regarding the practicality of installing power meters should not be used as an obstacle to the general principle that CLECs should only be required to pay for what they use, and no more. For example, the Commission should make clear that states may employ multiple methods for determining the amount of power usage. Thus, where a state commission determines that power meters are not economical or practical, CLEC power usage could be determined by the downward-adjusted List 1 drain for the equipment drawing power.<sup>25</sup> While states should be free to determine which of these options is most appropriate for the specific conditions in their states, it is critical for the Commission to implement at a federal level the general principle that DC power should only be billed according to the amount of power actually consumed, rather than the amount of power fused.

Finally, Covad urges the Commission to refrain from adopting any procedural requirements for state commissions to follow in implementing new TELRIC rules it develops in this proceeding. Covad urges the Commission not to subject competitors and state commissions to the extraordinary drain of time and resources that a mandatory timetable for implementing new TELRIC rules would impose. Instead, state commissions should be free to initiate new cost dockets according to their own determinations of need and resources, until which time existing rates would remain in effect.

Covad urges the Commission to adopt the proposals presented herein.

Respectfully submitted,

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<sup>25</sup> See Covad Comments at 21-22.

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